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IN THE
COURT OF APPEALS OF INDIANA

ALFREDO C. BOTELLO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0708-CR-752
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable George J. Heid, Judge[1]
Cause No. 79D02-9910-CF-116

March 28, 2008

[1] This matter was originally heard before the Honorable George J. Heid. Judge Heid has since passed away. Leave to file this belated appeal was granted by the Honorable Cynthia Garwood, Temporary Judge.

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

In this belated appeal, Appellant-Defendant Alfredo C. Botello challenges his forty-year sentence imposed by the trial court following his guilty plea and conviction for two counts of Class A felony Dealing in Cocaine[2] and one count of Class A felony Conspiracy to Commit Dealing in Cocaine.[3] Botello alleges that the trial court abused its discretion by imposing an enhanced forty-year sentence because the court relied on allegedly invalid aggravators. Botello further alleges that his sentence is inappropriate in light of his character and the nature of his offense. Concluding that Botello's forty-year sentence was within the discretion of the trial court and that his sentence is appropriate, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 8, 1999, Botello sold 15.5 grams of cocaine for $600.00 to a confidential informant working with the Tippecanoe County Drug Task Force. On October 5, 2007, Botello sold the confidential informant 0.5 ounce of cocaine for $600.00. On October 7, 1999, the confidential informant introduced Botello to Trooper Alan Strange of the Indiana State Police, who was working undercover, at which time Trooper Strange purchased 25.9 grams of cocaine from Botello for $1200.00. On

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[2] Ind. Code § 35-48-4-1(b)(1) (1999).

[3] Ind. Code §§ 35-41-5-2 (1999) and 35-48-4-1(b)(1).

October 12, 1999, Botello sold Trooper Strange one ounce of cocaine for $1200.00. On October 14, 1999, Botello sold Trooper Strange four ounces of cocaine for $4800.00. Botello was arrested shortly after completing the sale.

On October 14, 1999, the State charged Botello with three counts of Class A felony dealing in cocaine and three counts of Class A felony possession of cocaine. On October 15, 1999, the State charged Botello with an additional three counts of Class A felony dealing in cocaine, two Counts of class A felony possession of cocaine, one count of Class A felony conspiracy to deal in cocaine, and one count of Class D felony maintaining a common nuisance. On June 27, 2000, pursuant to a plea agreement, Botello pled guilty to two counts of Class A felony dealing in cocaine and one count of Class A felony conspiracy to deal in cocaine. In exchange, the State dismissed all additional charges, and the executed portion of Botello's sentence was capped at fifty years. On July 31, 2007, the trial court granted Botello's petition for permission to file a belated appeal. This appeal follows.

DISCUSSION AND DECISION

On appeal, Botello challenges his sentence on two grounds. First, Botello contends that the trial court abused its discretion by considering allegedly improper aggravating factors at sentencing, and that as a result, the significant mitigating factors were improperly balanced against any remaining proper aggravating factors. Second, he contends that his sentence was inappropriate in light of his character and the nature of his offense.

A. Aggravators

As a preliminary matter, we note that because the convictions and sentence at issue were based upon the statutory scheme involving presumptive sentences prior to the 2005 sentencing amendments creating advisory sentences, we apply the sentencing laws applicable to the presumptive sentencing scheme. We specifically observe that the rule in *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), stating that the relative weight of aggravators and mitigators is not reviewable for abuse of discretion, does not apply here.

Generally, sentencing determinations are within the trial court's discretion. *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007). We review the trial court's sentencing decision for an abuse of discretion. *Id*. An abuse of discretion has occurred when the sentencing decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id*. Trial courts have the discretion to deviate from the presumptive sentence upon finding and weighing any aggravating or mitigating circumstances. *Id*. A single aggravating circumstance is adequate to justify a sentence enhancement. *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). However, when a trial court enhances a presumptive sentence, it must state its reasons for doing so, identifying all significant aggravating and mitigating factors; stating the facts and reasons that led the court to find the existence of each such circumstance; and demonstrating that the court has evaluated and balanced the aggravating and mitigating factors in determining the sentence. *McElroy*, 865 N.E.2d at 588. This serves to guard against arbitrary sentences and to provide an adequate basis for appellate review. *Id*.

The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court. *Id*. at 589 (citing *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002) ("In reviewing a sentencing decision in a non-capital case, we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings.")). Therefore, when we are faced with a situation in which the trial court has entered both oral and written sentencing statements, we examine both statements alongside one another to assess the conclusions of the trial court rather than presuming the superior accuracy of one statement over the other. *See id.*

Here, at the conclusion of Botello's sentencing hearing, the trial court issued the following statement:

> Well, Mr. Bortello, we kind of look here and find some mitigating factors about your service in the military, honorable discharge, you were on active duty during Desert Storm. … And [you] were injured and then left the military. You have a prior DUI conviction in 1990, but not a serious criminal history or record I should say of prior convictions. And you have pled guilty here and your attorney indicates you're taking responsibility for your actions, although there is some minimization of your involvement here in the initial cleanup statement and attempt to shift the blame and you minimize the size of your enterprise at least to Dr. Vanderwater-Piercy in connection with his evaluation. And for that reason I think I have to discount to a certain extent his evaluation on the amount of your criminal enterprise and activity that was involved here. I think during the same time you've led this life of being employed and serving in the military you've kind of built up, unfortunately for yourself an increasing level of drug activity. Your drug usage dates back quite a few years and it certainly intensified in recent years. You've been on quite a binge here with regard to usage of drugs and selling increased quantities more and more and more drugs at substantial profit to yourself. Now, you admit in the cleanup statement you indicate to the probation officer that you were making three to four thousand dollars a week. The figures may very well justify five thousand dollars a week or so here on net profit. Some of which I imagine

> you're putting back into your own—to support your own habit of using cocaine and other varieties of drugs, but nevertheless those were the profits of your enterprise here. That you were continuing to expand and you were continuing to exploit and develop up until the time of your arrest and probably would be doing so today had you not been arrested and placed in custody. But you were attempting to recruit other dealers and the evidence shows here that you were certainly one of the larger dealers that have really come through the court system. In this community we don't often see dealers of multiple ounce quantities of cocaine and these volumes of drugs and the dollar amounts involved. Having on hand after selling four ounces of cocaine, still having on hand approximately twenty-one ounces of cocaine … that's a significant quantity of cocaine to have on inventory, not only in this community, but about anywhere. And this kind of activity, of course, you know, spreads out the harm in a way which really can't be quantified or even known even to yourself, where you're selling to dealers who in turn are selling in much smaller quantities to many, many people in the community. You might be selling to five or ten people each of whom are in turn selling to multiple customers of these drugs and it spreads out in the community and causes harm—additional criminal activity beyond drug usage, drug dealing, and, of course, we're always trying to support rehabilitative efforts throughout this community to deal with those who are your ultimate customers and users of this type of enterprise. So, I think when you're characterized here as a dealer's dealer it does seem to ring true and it does seem to fit the facts here that have been compiled, not only by the Probation Department, but by others in the file that's been assembled here in connection with the prosecution of this action. You've pled guilty to three counts, Count VII, Dealing In Cocaine, a Class A felony; Count XI, Conspiracy to Deal In Cocaine, a Class A felony; and Count XIII, Dealing In Cocaine, a Class A felony. Serious matters, as you very well know, two of those counts are non-suspendable. But in evaluating this and seeing the size of your transactions and the quantity of drugs and over the period of time that you were dealing here, a year or more, we see that this really goes far beyond the threshold of the requirement to make this type of transaction an A felony. And because of these quantities and these numbers of transactions and the numbers of victims ultimately resulting from these transactions I think that a sentence of forty years is justified here on each of the three counts. I'm going to suspend five years with thirty-five years executed. And require that you be on supervised probation for that five-year period.

Tr. pp. 79-82. The trial court subsequently summarized its findings in the following written sentencing statement:

> The Court finds as aggravating factors that the defendant has a criminal history. The defendant minimized his involvement. The defendant minimized [the] size of his enterprise to Doctor Vandewater-Piercy during his evaluation. The defendant's use of drugs and selling increased quantities at substantial profit. The defendant had a significant amount of cocaine on inventory.
>
> The Court finds as mitigating factors the defendant was honorably discharged from the military. The defendant was on active duty during Desert Storm.

Appellant's App. p. 37. Upon review, pursuant to McElroy, we consider both the trial court's oral and written statements. *See McElroy*, 865 N.E.2d at 589. Although Botello points to each factor in the written sentencing statement as a separate aggravator, after reviewing both sentencing statements, we are convinced that the trial court effectively relied upon only two separate aggravating circumstances, those being Botello's involvement in a substantial drug operation and Botello's criminal history.[4]

The Indiana Supreme Court has held that the trial court may properly consider the fact that "the circumstances of the crime suggest that the defendant was involved in a substantial drug operation" to be an aggravating circumstance supporting an enhanced sentence. *See Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). The presumptive term for a Class A felony is thirty years. *Moore v. State*, 691 N.E.2d 1232, 1236 (Ind. Ct. App.

[4] We recognize that the parties argue that the trial court relied on various independent aggravating factors in enhancing Botello's sentence. However, after our review of the court's written and oral sentencing statements, we believe that four of the factors listed in the court's written sentencing statement (*i.e.*, defendant minimized his involvement, defendant minimized the size of his enterprise to Dr. Vandewater-Piercy, defendant's use of drugs and selling increased quantities at substantial profit, and defendant had a significant amount of cocaine on inventory) effectively support the court's finding in its oral sentencing statement that Botello was involved in a substantial drug operation and do not amount to individual aggravating factors. Therefore, we decline to consider each of these factors individually, but rather will consider whether the trial court's reliance upon its finding that Botello was involved in a substantial drug operation was a proper aggravating factor.

1998) (citing Indiana Code § 35-50-2-4). That term may be enhanced by an additional twenty years based on a finding of aggravating circumstances. *Id*.

Here, the trial court found that the evidence established that Botello was involved in a substantial drug operation. Trooper Strange testified at sentencing that Botello "is probably one of the larger [cocaine] dealers that we've seen in this area for a long time." Tr. p. 53. Trooper Strange also testified that while conducting an independent investigation, law enforcement became aware that Botello was supplying other dealers and that Botello was trying to recruit additional dealers. Additionally, Botello admitted that he had entered into numerous sales of cocaine, each in increasing weight and value, with Trooper Strange, the final sale being four ounces of cocaine at a cost of $4800.00. Botello also admitted that at the time of his arrest, he possessed approximately one pound (453.59 grams) of cocaine. Furthermore, at the sentencing hearing, the State referenced Botello's statements made to Trooper Strange that "you know, it's going to take a long time [un]til [the authorities] catch on to me … [i]t's going to take a couple of years." Tr. p. 76.

Based on our review of the record, we conclude that the trial court was within its discretion to rely on its finding that the evidence established that Botello was involved in a substantial drug operation as a significant aggravating factor and that this single aggravating factor was sufficient to support Botello's enhanced sentence. *See McNew*, 822 N.E.2d at 1082. Having concluded that this aggravator was adequate to support Bortello's enhanced sentence, we find it unnecessary to consider his challenge to the court's consideration of his criminal history. We therefore conclude that the trial court

did not abuse its discretion when it sentenced Botello to an enhanced term of forty years. *See Moore*, 691 N.E.2d at 1237. In addition, while we acknowledge that the trial court recognized Botello's honorable discharge from the United States National Guard as a mitigating circumstance, we conclude that the trial court acted within its discretion in finding that Botello's involvement in a substantial drug operation outweighed any mitigating weight that might be attributed to Botello's military service.

B. Appropriateness

Finally, Botello contends that his forty-year sentence is inappropriate in light of his character and the nature of his offenses. This court has the constitutional authority to revise a sentence pursuant to Appellate Rule 7(B) if we find that it is inappropriate in light of the nature of the offense and the character of the offender; however, our review of any sentence is very deferential to the trial court's decision. Ind. Appellate Rule 7(B); *Martin v. State*, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003). The burden lies with the defendant to persuade this court that his or her sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Botello argues that his forty-year sentence is inappropriate in light of the nature of his offenses because he never sold any cocaine to children and his operation was non-violent. We find this argument unpersuasive. The evidence establishes that Botello was involved in a large-scale drug operation and that upon his arrest, he possessed approximately a pound of cocaine. Additionally, the trial court found that Botello could be described as a "dealer's dealer." Furthermore, when Botello was arrested, he was in

the possession of multiple firearms, suggesting that if the circumstances necessitated, he had the capacity to become violent. As such, Botello has failed to convince us that his sentence is inappropriate in light of the nature of his offenses.

Botello further argues that his forty-year sentence is inappropriate in light of his character because he was addicted to drugs himself, suffered from internal insecurities, possibly suffered from depression, and was described by friends and family as a good and hardworking man. Again, we are unpersuaded by this argument. Botello admitted that because of his internal insecurities, he felt compelled to act like a "big shot" and that he tried to "buy" friends with drugs. Botello was unemployed at the time of his arrest and, as a result, he supported his family with the money he made from his drug operation. Botello admitted to longstanding criminal and reckless behavior illustrating his general disregard for the law dating back to his teens. Despite highlighting his family's and friends' claims that he was a good and hardworking man, Botello has failed to convince us that his sentence is inappropriate in light of his character. In sum, having concluded that the trial court did not abuse its discretion by sentencing Botello to an enhanced forty-year sentence and further concluding that Botello's sentence was appropriate in light of the nature of his offenses and his character, we affirm the sentence imposed by the trial court.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.